The Wang Theatre, Inc. d/b/a Citi Performing Arts Center *and* Boston Musicians Association, a/w American Federation of Musicians Local Union No. 9-535, AFL–CIO. Case 01–CA–179293

February 14, 2017

ORDER DENYING MOTION

BY ACTING CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

The Respondent's motion for reconsideration of the Board's Decision and Order reported at 364 NLRB No. 146 (2016) is denied. The Respondent has not identified any material error or demonstrated extraordinary circumstances warranting reconsideration under Section 102.48(d)(1) of the Board's Rules and Regulations.

Dated, Washington, D.C. February 14, 2017

Mark Gaston Pearce Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

ACTING CHAIRMAN MISCIMARRA, concurring.

This case originated with a representation petition filed by Boston Musicians Association, a/w American Federation of Musicians Local Union No. 9-535, AFL–CIO (Union), seeking to represent local musicians employed in various musical productions. The petition identified the Respondent—The Wang Theatre, Inc. d/b/a Citi Performing Arts Center (the "Theatre")—as the employer. I write separately because I believe substantial questions exist regarding whether the Theatre can properly be regarded as the employer of local musicians who perform in productions that take place at the Theatre. However, the Board presently is considering a motion for reconsideration, and this posture of the case, as explained below, does not permit the Board to address the merits of these questions. Therefore, I concur with my colleagues' denial of Respondent's motion for reconsideration.

Background

On January 28, 2016, the Board's Acting Regional Director issued a Decision and Direction of Election (DDE) that provided for an election among local musicians "employed" by the Theatre.[1] However, the DDE noted that the Theatre hosted 22 productions in 2015, *none* of which involved the employment of *any* musicians; and the Theatre hosted 21 productions in 2014, of which only two required the hiring of local musicians. In those two productions combined, a total of 17 local musicians worked between 19 and 105 hours. The Theatre requested review of the DDE, and a three-member panel of the Board denied review on June 3, 2016.[2] I was not a member of the panel that denied review.

In the ensuing election, the Union prevailed, and the Theatre refused to bargain, which is the only way an employer can obtain court review of decisions rendered by the Board in representation cases. These are commonly referred to as "test-of-certification" cases. In such a case, the employer's refusal to bargain prompts the filing of an unfair labor practice charge with the Board, resulting in the issuance of a complaint against the employer alleging that its refusal to bargain violates Section 8(a)(5) of the Act, and the Board grants summary judgment against the employer because no facts regarding the employer's refusal to bargain are disputed. Significantly, when deciding whether to grant summary judgment in a test-of-certification case, the Board does *not* permit the parties to engage in a repeat litigation of claims that were unsuccessfully argued in the underlying representation case.

The Theatre's refusal to bargain resulted in a typical test-of-certification proceeding, and the Board granted summary judgment against the Theatre on November 10, 2016.[3] I participated in this summary judgment decision and agreed with the entry of summary judgment because the Theatre had not presented any new arguments apart from what had been unsuccessfully argued in the representation case. Our decision granting summary judgment indicated that I had not participated in the earlier representation case. It also stated that I did not "reach or pass on the merits" of the Board's earlier decision.[4]

Now, the Theatre has requested reconsideration of the Board's November 10, 2016 decision granting summary judgment against the Theatre. Here as well, the Theatre raises the same arguments unsuccessfully litigated in the representation case. Primarily, the Theatre again argues

[1] See *The Wang Theatre, Inc.*, Case 01–RC–166997 (Acting Regional Director's Decision and Direction of Election, Jan. 28, 2016).

[2] See *The Wang Theatre, Inc.*, Case 01–RC–166997 (Board order denying review, June 3, 2016).

[3] See *The Wang Theatre, Inc.*, 364 NLRB No. 146 (2016).

[4] Id., slip op. at 1 fn. 2.

that it could not reasonably be deemed the "employer" of the local musicians who worked for various producers. The Theatre points out that local musicians did not even perform in any of the 15 shows presented at the Theatre in 2015, and local musicians only performed in 2 of the Theatre's 21 productions in 2014. Moreover, as noted before, when local musicians performed at the Theatre, the producers—not the Theatre—controlled virtually everything associated with the work they performed.

Discussion

When considering the Theatre's motion for reconsideration, I find myself in the same position I occupied when the Board granted summary judgment against the Theatre. The Board will not grant a party's request for reconsideration absent extraordinary circumstances or new arguments not previously considered by the Board.[5] Consequently, I join in the Board's denial of the Theatre's request for reconsideration. At this juncture, the Theatre's arguments challenging "employer" status can only legitimately be raised before a court of appeals if the Theatre decides to appeal the Board's test-of-certification order.

However, the questions addressed by the parties regarding the Theatre's "employer" status appear to be substantial. On the one hand, consistent with established Board case law, I agree that the project-by-project employment that often occurs among musicians and other employees in the performing arts warrants specialized evaluation of questions regarding appropriate bargaining unit and voter eligibility.[6] Conversely, the Board cannot appropriately conduct an election when the bargaining unit consists of no employees.[7] In this regard, the Theatre has not had a contractual relationship or a collective-bargaining agreement since 2007, no local musicians performed in any production in 2015, and local musicians performed in only two productions during 2014. These facts raise a reasonable question regarding whether the Theatre currently employs any musicians.

Even more difficult is the question whether the Theatre is an "employer" of musicians. The highly irregular nature of work by musicians at the Theatre, combined with the specialized and non-exclusive nature of their work, among other things, bears some resemblance to independent contractor status, and the Act excludes independent contractors from the definition of "employee."[8] Furthermore, the DDE indicates that when the Theatre arranged for local musicians to play in various productions, it essentially acted like a referral agency, and virtually all aspects of the actual work performed by local musicians were controlled by the producer and the producer's own personnel. The Acting Regional Director also found that the producers were required to "assume the contractual cost" associated with the local musicians who performed in any production.[9]

From 2004 to 2007, the Theatre *was* party to a collective-bargaining agreement (CBA) covering musicians, but there has been no more recent agreement, nor have the parties had any other contractual relationship. Moreover, the Board has held that whether a particular entity is identified as the "employer" in a CBA does not control whether the entity *is* an "employer." See *CNN America, Inc.*, 361 NLRB No. 47 (2014) (Board majority finds that CNN was a joint employer of technical employees when successive CBAs only identified CNN's contractors as the "employer," and majority holds that "certification and the history of collective bargaining" have "little relevance" when evaluating employer status).

Another challenging issue here involves the appropriateness of a unit limited to the Theatre, when the record strongly suggests that "employer" status, if it exists, would apply *jointly* to the Theatre and each producer who decided to use local musicians. As to this issue, the Acting Regional Director's DDE leaves little doubt that producers—much more so than the Theatre—control virtually every aspect of the work performed by local musicians at the Theatre.[10]

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[5] See, e.g., *Phoenix Coca-Cola Bottling Co.*, 338 NLRB 498, 498 (2002) (motion for reconsideration denied where the moving party did not present any extraordinary circumstances or new arguments not previously considered by the Board).

[6] See, e.g., *The Juilliard School*, 208 NLRB 153 (1974).

[7] *Foreign Car Center, Inc.,* 129 NLRB 319, 320 (1960) ("[T]he principle of collective bargaining presupposes that there is more than one eligible person who desires to bargain," and "[t]he Act . . . does not empower the Board to certify a one-man unit."). Cf. *Miller & Anderson, Inc.*, 364 NLRB No. 39, slip op. at 22–23 (2016) (Member Miscimarra, dissenting) (finding it inappropriate to resolve disputed unit issues when it appeared to be uncontroverted that nobody had been employed in the putative unit for more than 3 years).

[8] Sec. 2(3) of the Act states in pertinent part that "[t]he term 'employee' shall include any employee . . . but shall not include . . . any individual having the status of an independent contractor."

[9] DDE, supra fn. 1, pp. 2–3.

[10] The Acting Regional Director found that the "producers determine[] how many musicians [are] required for each production, as well as the number of local musicians to be hired," the producers assume the "contractual cost of [the] employees," they determine "whether live or recorded music will be used for a production; whether local musicians will be hired; and if so, how many," and each producer "employs the conductor who has artistic control over the musicians' performance, regardless of how the musicians are sourced." Id. In spite of these findings—which leave no doubt that the producers control virtually everything associated with the actual work performed by local musicians at the Theatre—the Acting Regional Director stated there was no "clear evidence that the producers control or even affect the terms of employment for the musicians." Id.

At a minimum, the DDE reveals that the record is silent or incomplete as to important indicia regarding whether the producers, in fact,

Recent Board cases demonstrate that the Acting Regional Director's finding—making the Theatre the sole "employer" of unit employees—involves no small matter. In *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015), the Board majority more expansively defined joint-employer status, emphasizing that bargaining obligations should be imposed on multiple employer entities whenever they "'share or codetermine those matters governing the essential terms and conditions of employment,'" and stating that "'all of the incidents of the relationship must be assessed.'"[11] In *Miller & Anderson, Inc.*, supra, the Board majority held it was appropriate to impose bargaining obligations on two or more joint-employer entities, even when one entity lacked *any* employment relationship with some bargaining-unit employees.[12]

The Acting Regional Director did not apply or make reference to *Browning-Ferris*, supra, which was issued 4 months before the Acting Regional Director rendered her decision in the instant case. Although the Board majority decided *Miller & Anderson* after the Acting Regional Director issued her decision here, the Board in *Miller & Anderson* held that it should be applied retroactively to all pending cases.[13] Given the importance that the Board has placed on joint-employer status in these other cases, I find it difficult to explain why the bargaining unit here was upheld by the Acting Regional Director and the Board, with no analysis of *Browning-Ferris*, and when the record evidence regarding the producers' potential "employer" status may have been misconstrued, discounted or disregarded as incomplete. See fn. 10, supra.

CONCLUSION

At present, the Board only decides whether the Respondent's motion for reconsideration should be granted, which would be justified only if the Respondent has identified extraordinary circumstances warranting reconsideration.[14] Because the arguments raised by Respondent were evaluated in the prior representation case, and because the Board properly granted summary judgment against the Respondent without permitting the Respondent to litigate the same claims in this test-of-certification case, I concur with my colleagues' denial of Respondent's motion for reconsideration.

Dated, Washington, D.C. February 14, 2017

Philip A. Miscimarra, Acting Chairman

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were statutory employers or joint employers. Id., p. 3 (stating there was "no evidence" regarding "where other traditional supervisory authority lies," such as who has "authority to discipline a musician for showing up late for a rehearsal"). It appears that relevant control that was obviously exercised by producers was discounted by the Acting Regional Director, as evidenced by her repeated use of the phrase "artistic control" with the implication that "artistic control" does not count, or somehow differs from other types of control, when the Board makes determinations about employer status. See, e.g., DDE, p. 3 ("Producers have artistic control over the shows they bring to the Wang," "the producer's conductor clearly has artistic control over the musicians," and "[t]here is no evidence in the record indicating whether the conductor possesses supervisory authority other than artistic control."). Along similar lines, the Acting Regional Director discounted the producers' control over assessing the qualifications of local musicians. For example, the DDE states, "[I]t does not appear that the producer retains any control over the qualifications of those [musicians] hired, except that they are able to play the required instruments." Id. This seemingly disregards the fact that the primary qualification of musicians (indeed, the *sole* qualification in most cases) is the ability to play the required music on the instrument to which they are assigned.

[11] Id., slip op. at 2, 16 (footnote omitted) (quoting *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117, 1123 (3d Cir. 1982); *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 258 (1968)). I dissented from the majority's decision in *Browning-Ferris*. Id., slip op. at 21–49 (Members Miscimarra and Johnson, dissenting).

[12] 364 NLRB No. 39, slip op. at 13–14. I dissented from the majority's decision in *Miller & Anderson*. Id., slip op. at 14–23 (Member Miscimarra, dissenting).

[13] Id., slip op. at 14 fn. 40.

[14] See Section 102.48(d)(1) of the Board's Rules & Regulations.